

**SANITIZED DECS. – 04-090 FN, 04-091 U, 04-092 W, 04-093 N & 04-094 C – BY –
GEORGE V. PIPER – ISSUED – 5/20/04**

SYNOPSIS

**CONSUMERS' SALES AND SERVICE TAX – PURCHASERS' USE TAX --
CORPORATE NET INCOME TAX -- BUSINESS FRANCHISE TAX --
WITHHOLDING TAX -- BURDEN OF PROOF NOT MET --** Because Petitioner kept no records whatsoever, choosing instead to deal strictly in cash and admitted on the record that the Petitioner routinely kept for its own purposes the trust fund taxes it collected on behalf of the State of West Virginia, the Petitioner failed to prove that the estimated assessments were incorrect or contrary to law, in whole or in part. *See* W. Va. Code § 11-10A-10(e) [2002] and 121 C.S.R. 1, § 63.1 (Apr. 30, 2003).

FINAL DECISION

The Field Auditing Division of the West Virginia State Tax Commissioner's Office conducted an audit of the books and records of the Petitioner. Thereafter, on December 17, 2003, the Director of this Division of the Commissioner's Office issued a consumers' sales and service tax assessment against the Petitioner. The assessment was for the period of January 1, 2000 through September 30, 2003, for tax, interest through December 31, 2003, and additions to tax, for a total assessed tax liability.

Also, on December 17, 2003, the Commissioner (by the Division) issued a purchasers' use tax assessment against the Petitioner, under the provisions of Chapter 11, Articles 10 and 15A of the West Virginia Code, for the period of January 1, 1998, through September 30, 2003, for tax, interest, through December 31, 2003, and no additions to tax, for a total assessed liability.

Also, on December 17, 2003, the Commissioner (by the Division) issued a withholding tax assessment against the Petitioner, under the provisions of Chapter 11,

Articles 10 and 21 of the West Virginia Code, for the period of January 1, 2000 through September 30, 2003, for tax, interest through December 31, 2003, and additions to tax, for a total assessed liability.

Also, on December 17, 2003, the Commissioner (by the Division) issued a business franchise tax assessment against the Petitioner, under the provisions of Chapter 11, Articles 10 and 23 of the West Virginia Code, for the period of January 1, 2000 through December 31, 2002, for tax, interest through December 31, 2003, and additions to tax, for a total assessed liability.

Also, on December 17, 2003, the Commissioner (by the Division) issued a corporate net income tax assessment against the Petitioner, under the provisions of Chapter 11, Articles 10 and 24 of the West Virginia Code, for the period of January 1, 2000 through December 31, 2002, for tax, interest through December 31, 2003, and additions to tax, for a total assessed liability.

Written notice of all these assessments was served on the Petitioner on December 22, 2003.

Thereafter, by mail postmarked February 11, 2004, the Petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, a petition for reassessment. *See* W. Va. Code § 11-10A-8(1) [2002].

Subsequently, notice of a hearing on the petition was sent to the Petitioner and a hearing was held in accordance with the provisions of W. Va. Code § 11-10A-10 [2002] and 121 C.S.R. 1, § 61.3.3 (Apr. 20, 2003).

FINDINGS OF FACT

1. Petitioner refused to cooperate in making his records subject to audit, which forced the tax auditor to estimate all five assessments.
2. Petitioner kept no cash register tapes to prove what amount of gross receipts was received by the bar/restaurant for each day.
3. Petitioner dealt entirely in cash and admitted that the Petitioner kept consumers' sales and service tax, which the Petitioner collected for its own use.
4. Petitioner possessed no legitimate records whatsoever, but only notations on envelopes stating what the business made, what Petitioner paid his employees, and what items Petitioner purchased for the business versus what Petitioner's president purchased for his own personal use.

DISCUSSION

The sole issue is whether the Petitioner has shown that the assessments are incorrect and contrary to law, in whole or in part, as required by W. Va. Code § 11-10A-10(e) [2002] and 121 C.S.R. 1, § 63.1 (Apr. 20, 2003).

In this case, Petitioner provided absolutely nothing to prove that the estimated assessments were incorrect, after refusing to allow his records to be audited.

Petitioner openly admitted that it collected sales tax and kept the same, rather than remitting same to the Tax Commissioner. He also refused to use cash register tapes, which

would have documented his business receipts. When Petitioner does file tax returns, the same are no-remittance returns.

CONCLUSIONS OF LAW

Based upon all of the above it is **DETERMINED** that:

1. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon the petitioner-taxpayer, to show that the assessment is incorrect and contrary to law, in whole or in part. *See* W. Va. Code § 11-10A-10(e) [2002] and 121 C.S.R. 1, § 63.1 (Apr. 20, 2003).

2. The Petitioner-taxpayer in this matter has completely failed to carry the burden of proof with respect to the issue of whether the estimated assessments are clearly excessive.

DISPOSITION

WHEREFORE, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the consumers' sales and service tax assessment issued against the Petitioner for the year period of January 1, 2000, through September 30, 2003, for tax, interest, and additions to tax, should be and is hereby **AFFIRMED**.

Pursuant to the provisions of W. Va. Code § 11-10-17(a) [2002], **interest accrues** on this consumers' sales and service tax assessment, until this liability is fully paid.

It is **ALSO** the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the purchasers' use tax assessment issued against the Petitioner for the

period of January 1, 1998, through September 30, 2003, for tax, interest, and no additions to tax, should be and is hereby **AFFIRMED**.

Pursuant to the provisions of W. Va. Code § 11-10-17(a) [2002], **interest accrues** on this purchasers' use tax assessment, until this liability is fully paid.

It is **ALSO** the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the business franchise tax assessment issued against the Petitioner for the period of January 1, 2000 through September 30, 2003, for tax, interest, and additions to tax, and additions, should be and is hereby **AFFIRMED**.

Pursuant to the provisions of W. Va. Code § 11-10-17(a) [2002], **interest accrues** on this business franchise tax assessment, until this liability is fully paid.

It is **ALSO** the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the corporate net income tax assessment issued against the Petitioner for the period of January 1, 2000 through December 31, 2002, for tax, interest, and additions to tax, should be and is hereby **AFFIRMED**.

Pursuant to the provisions of W. Va. Code § 11-10-17(a) [2002], **interest accrues** on this corporate net income tax assessment, until this liability is fully paid.

Finally, it is **ALSO** the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the withholding tax assessment issued against the Petitioner for the period of January 1, 2000 through September 30, 2003, for tax, interest, and additions to tax, should be and is hereby **AFFIRMED**.

Pursuant to the provisions of W. Va. Code § 11-10-17(a) [2002], **interest accrues** on this withholding tax assessment, until this liability is fully paid.